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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 349

GILBERT E. THIEL,
Petitioner,

vs.

SOUTHERN PACIFIC CO., A CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF

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Opinion of the Court Below

The opinion of the Circuit Court is now reported in 149 F. (2) 783.

Preliminary

Defendant corporation's Answer to Petition for Certiorari seeks to totally *eliminate* the ADMISSIONS contained in the *testimony* of the Clerk and Jury Commissioner and also in the testimony of its *own agents* on the alleged theory that there is some "conflict" in the testimony and therefore, the decisions of the District Judge and the jury thereon are absolutely final. However, defendant Southern Pacific Co. conveniently overlooks the fact that plaintiff is relying here SOLELY upon the testimony of said Clerk and Jury Commissioner to establish CONCLUSIVELY their improper and

illegal jury selection methods, as they did *all* of the selecting. Similarly, plaintiff relies SOLELY upon the testimony of defendant's own agents to show CONCLUSIVELY the INSUFFICIENCY of the evidence AS A MATTER OF LAW to sustain the judgment for defendant. The defendant corporation's *whole defense* on the three issues of negligence rests upon said testimony of its own agents.

Thus, there can be no "conflict" in the evidence relied upon by plaintiff, or if there is any, it must be in the very testimony upon which defendant relies to *sustain* the judgment.

Defendant has also overlooked *Reliance Life Ins.* v. *Burgess*, 7 Cir., 112 F. (2) 234, 240 (1940 Cert. denied 311 U. S. 690), cited by petitioner on page 57, where the verdict was for defendant. The Circuit Court found the EVIDENCE INSUFFICIENT *to support the verdict* AS A MATTER OF LAW and directed the trial Court to set aside the verdict and enter judgment as requested by plaintiff's motion.

Otherwise, defendant's said Answer consists mainly of garbled versions and misstatements of the testimony in the *Record*, as will be shown.

I. Irregularities in the Selection of Jury Preventing Fair Trial to Plaintiff

Defendant and respondent's said Answer states in Note 22 on page 9 that an "attack" was made on the "integrity of the Clerk and Jury Commissioner." Plaintiff and appellant has stated in his briefs and now repeats that the integrity or honesty of said officials is not in issue here. They merely followed the "system" of selecting mostly business people and excluding nearly all those who worked with their hands. This system is clearly improper and *illegal*. Their intentions and "motives" as set forth on pages 13 and 14 of said Answer may have been of the best

and most honorable but "the road to hell is paved with good intentions." The Jury Commissioner frankly admitted his *ignorance* of the applicable California State Code sections governing "qualifications" of jurors (R. 49), so he did not even know that only "*ordinary* intelligence" was necessary under *California Code of Civil Procedure Section 198* but selected "at LEAST 50%" from the "BUSINESS DISTRICT of San Francisco" (R. 51) on the theory that they would be of *higher* intelligence.

Said Jury Commissioner was also *ignorant* of *California Code of Civil Procedure Section 200* which lists those *exempt* as jurors but makes no mention whatsoever of daily wage earners, building trades workers or "machinists."

Defendant's said Answer on page 10 quotes from *Glasser* v. *United States*, 315 U. S. 60, 85, that "the officials charged with choosing Federal jurors may exercise *some discretion* to the end that competent jurors should be called." But defendant OMITS what immediately follows:

> "But they must *not* allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a *cross-section of the community*. Tendencies, *no matter how slight*, toward the selection of jurors by *any method* other than a process which will *insure* a trial by a *representative* group are *undermining* processes weakening the institution of jury trial, and should be *sturdily resisted*. That the MOTIVES influencing such tendencies may be of the best *must not blind us* to the dangers of allowing *any encroachment* whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties."

The Jury Commissioner *testified* that "his *duty* was merely to select a CROSS-SECTION of the people of San Francisco who might be impartial and fair jurors" (R. 48), but he says he made *no* effort to get a "CROSS-SECTION of the

people of San Francisco with regard to wealth" (R. 50). Is this permissible under "some discretion"?

Defendant contends on pages 15 and 16 that plaintiff argues for a mathematical selection of jurors to include every shade of race, religion, political thought and occupation. This is absurd. Plaintiff contends that under the above *Glasser* case the jury selection officials must at least make some *reasonable* effort to get a fair cross-section of the community which they *admittedly* and *obviously* did NOT do in this case. Said officials CAN and MUST obtain a cross-section to insure the impartial trial guaranteed under the Federal Constitution.

In spite of their good "motives" and "some discretion" and "ignorance" it cannot be questioned here that the jury selection methods "*generally*" used by the Clerk (R. 28) and which also "applies to the jury list" *in this case* (R. 35), and *generally* used by the Jury Commissioner and which also applies to *this case* (R. 51) show a "*systematic* and *arbitrary* EXCLUSION of *qualified* and *non-exempt* persons" which is *illegal* under the very authorities cited by defendant on pages 9 and 10 of its Answer. It is respectfully submitted that the *blanket exclusion* of "ALL the iron craft, bricklayers, carpenters and MACHINISTS" (R. 47) as jurors from *all* panels including the one in *this case*, when done "PURPOSELY" (R. 47) and where the plaintiff is a mechanic or machinist, earning a daily wage, is clearly illegal under our Constitution and the decisions of this Supreme Court. *Admittedly*, plaintiff's "CLASS" as a machinist which is "non-exempt" has been PURPOSELY EXCLUDED from ALL panels.

Furthermore, does "some discretion" permit the Clerk and Jury Commissioner to *arbitrarily exclude* ALL those earning a *daily wage* (R. 29, 31, 47) without inquiring whether they are willing to serve and without obtaining a

permissive order from the Court!. Obviously, the Court would never issue such an order as it would be highly discriminatory and illegal. Their theory that daily wage earners would not serve as jurors breaks down in *this case*, because somehow they selected Eugene Morgan who was then employed by Richmond Shipyard No. 1 which was engaged in 100% war work and he would obviously lose his higher daily wages while he served as a juror for only $4.00 per day, but yet he did *not* ask to be excused and he served on the jury. By a strange "co-incidence" said Mr. Morgan had formerly worked on the Southern Pacific's trains as a *railway* postal clerk (R. 92) and defendant Co. did not exercise its unused third peremptory challenge against him.

The frand *admission* that on ALL panels the "MAJORITY would be business people and their wives" (R. 32) with "*responsible* positions and pretty *substantial salaries*" (R. 37) is sufficient, of itself, to show systematic discrimination against the laboring or working class and particularly against the plaintiff here who was a mechanic or machinist. This Supreme Court can take judicial notice that about 75% or at least the vast majority of citizens are not "business people" with "substantial salaries." It is apparent no *cross-section* was selected.

Defendant's contention on page 15 that a cross-section without at least 50% of business people cannot be obtained is ludicrous as there were over 2,000,000 people in 9 counties to be drawn from.

Plaintiff is not relying upon his attorney's affidavit to show the illegal jury selection here but he is relying upon the plain ADMISSIONS in the *testimony* of the clerk and Jury Commissioner who did *all* of the jury selecting. It is submitted that no further legal showing is necessary here.

On page 13, said Answer says "No attention was paid to the proportion of women." Defendant overlooks the Jury

Commissioner's blunt *admission* that he has "PURPOSELY put on *more men* than women" and he even gave his own peculiar reasons for so discriminating (R. 49).

Defendant's Answer complains on page 16 that the composition of this panel was not analyzed in detail the same as the 24 actually examined at the trial. In view of the testimony of the Clerk and Jury Commissioner that their improper selection methods applied to all panels including this one (R. 28, 35, 51), it would seem unnecessary to say more. However, it is of interest that defendant does not deny the unusual preponderance of its friends among the 24 examined. Is there any doubt that these 24, drawn by lot, were a fair sample or cross-section of the rest of the panel? Counsel for defendant well knows the composition of said panel for he testified and *admitted* that he *regularly* transfers *all* personal injury cases from the State to the Federal Court where he has not lost a case in the past nine years 65-66), because he finds the Federal Court jurors are so "fair" (R. 65), and he alone finally demanded the *jury* trial in this case (R. 70-71).

It is also of interest that defendant does not deny or dispute the practically unanimous attitude of attorneys and the people of San Francisco in condemning the jury selection methods complained of here. He merely contends himself with sniping at plaintiff's counsel in note 5 on page 3 and carefully omits mentioning that the U. S. Board of Tax Appeals was *reversed* in 125 F. (2) 112, 141 A. L. R. 548.

On page 17 defendant makes a plain misstatement in saying: "Every juror who served was passed *for cause.*" The Record clearly shows that the jury was accepted only "subject to a *motion* which I will make *outside of the presence of the jury*" (R. 124). Then the plaintiff moved to strike out all twelve jurors in the box and entered a "challenge" "for cause" against all of them stating that "by

actual experience" it then appeared that there were on the jury "at *least* six jurors who are closely affiliated and connected with the Southern Pacific Co." (R. 124). Upon further examination it appeared that *10* of the jurors had business or social connections with defendant corporation (R. 88-121. See Pet. for Writ, pages 7-8). The connections were not merely as a "passenger" or "shipper" as defendant claims but meeting socially and playing golf with defendant's *officials* (R. 101-103) and receiving business from defendant's *officials* (R. 108; 115-6; 94-95) and personally acquainted with defendant's *officials* (R. 88; 98; 105; 120) and owning stock in a connected corporation (R. 107-8).

While plaintiff could not object for cause because one or maybe two jurors might be friends of some employees of defendant, he surely has a right to challenge for cause and move to strike out all 12 when at least 10 of them are admittedly so close to *officials* and employees of defendant corporation as to cast a definite doubt upon the jury's impartiality. (*Norris* v. *Alabama*, 294 U. S. 587, 589.)

II. The Evidence Is Wholly Insufficient to Sustain the Verdict and Judgment

Since the defendant's motion to dismiss on all three issues of negligence was promptly denied by the District Judge who stated that plaintiff had presented sufficient evidence "before the Court and jury", the only question to be considered here is whether the defendant's evidence is sufficient AS A MATTER OF LAW to sustain the judgment in its favor. Plaintiff most earnestly contends that the testimony of defendant's *own* agents clearly establishes its *gross* negligence here altho "*slight* negligence" towards a *passenger* is sufficient to hold it liable. (See Pet., p. 48.) Where the facts are *admitted*, this Supreme Court is not bound by the verdict of the jury, especially where friends of defendant overwhelmingly

dominate said jury, nor is it bound by the Circuit Court's misinterpretations and *omissions* of the evidence in the Record.

The facts as they appear *solely* from the testimony of defendant's own agents are much stronger than the facts in the recent case of *Calloway* v. *Hart*, 5 Cir., 142 F. (2) 103 (1944, Cert. den. 89 L. E. 895) where there was NO *specific* notice to the carrier that the passenger was CRAZY but he merely appeared to be drunk by observation but was *accepted* as a passenger and then *not guarded*. To permit recovery above and deny same to plaintiff Thiel would be neither fair nor just.

On page 2 of said Answer defendant makes the bold assertion that the testimony of its agents showing their *full* knowledge of plaintiff's intoxicated and *crazy* condition long before his accident has been misrepresented. Plaintiff simply refers to the *Record* citations on pages 10 and 11 of his Petition for Writ of Certiorari as a complete refutation. Defendant is merely hesitant to mention the fact that its agents observed nothing when questioned on direct examination but upon *cross-examination* they *broke down* and admitted they knew plaintiff was intoxicated and *crazy*.

On page 3, said Answer states that "No one said petitioner looked drunk." Defendant's own ticket seller swore in his deposition: "Q. Did the said Gilbert E. Thiel look drunk or alcoholic. A. YES." He tried to change his testimony at the trial but his attempted perjury was exposed. Defendant's head brakeman "smelled" *liquor* from plaintiff and asked the railroad "policeman what was *wrong* with him (plaintiff)," and said policeman then told him that plaintiff was "acting CRAZY from *drinking*" and that said brakeman should "keep an eye on him". Thus,

plaintiff not only looked "drunk" but defendant's agents *knew* he was "CRAZY."

Since defendant's railroad policeman admits that he knew plaintiff was "acting CRAZY from *drink*" and his "help" was *needed* to even get plaintiff to go on the train because the man with him "was afraid" plaintiff "might try to *run away*, having done so once before", the question of plaintiff's intoxication becomes of relatively minor importance along side of his *known* "CRAZY" and *demented* condition requiring a special guard to protect him and quiet his fears for his personal safety. Such a police guard would have undoubtedly prevented the accident which defendant could have reasonably anticipated.

Defendant's railroad policeman "*smelled*" *liquor* from the man with plaintiff so obviously he was not a "competent" attendant to stay awake all night in coach seats in order to guard the crazy plaintiff. (See *Pittman* v. *Hines*, 221 S. W. 474, where the carrier was not relieved of responsibility even where the demented person had three *competent* attendants.)

On page 8, said Answer relies on two Texas cases. Defendant overlooks the *latest* Texas case of *Stewart* v. *Houston*, 229 S. W. 577, holding the carrier liable in this type of case.

Even if plaintiff could walk by himself and made no commotion, this does not relieve the carrier of responsibility where it knows or should know that the passenger is intoxicated. *Dokus* v. *Palmer*, 33 A. (2) 315, 317 (1943). Surely, more care is required when the carrier knows the passenger is CRAZY. Said *Dokus* case says: "Stepping off the train in the manner he did is the *best indication* that he was unable to take care of himself."

On page 5, said Answer misrepresents Rippetoe's testimony. He testified that several things attracted his at-

tention to plaintiff who was a stranger to him. Plaintiff asked him for a cigarette which plaintiff lit and immediately threw down without stepping on it. Plaintiff asked Rippetoe for a drink of water and when he brought it, plaintiff refused to even touch it. When plaintiff had been told by the brakeman to go into the smoker ahead, he exclaimed: "God damn it, that makes it worse."

In note 4 on page 2, said Answer says: "The conductor's testimony did not deal with petitioner, but with a hypothetical case." The conductor testified that if "Sorenson, the police officer told" him "that the plaintiff here, *Mr. Thiel*, was acting crazy from drink and that he had run away, etc.", he "would have asked" the policeman "to go along".

Plaintiff's former wife and the man with them were not called as witnesses only because they could not be found.

In note 14 on page 6, said Answer says "The conductor estimated that the petitioner was hanging out the window only "a few seconds." Defendant would have it appear that plaintiff "leaped out" the window and promptly fell to the ground before the stop signal could be given. But even defendant's citation of "Record 698-700" shows that said conductor admitted in his deposition: "I would say about a minute or a minute and a half." And later at the *trial*, he definitely answered to the question: "• • • a minute and a quarter to a minute and a half?" "A. I guess it was *all* of that from the time he went out until he dropped." Thus, even if Sherman, the brakeman, who saw plaintiff start thru the window did signal at once, the engineer *negligently* failed to stop during said one minute and a half and then when plaintiff fell to the ground, the train had to back up 600 feet which is the USUAL stopping distance at said place where the train *could* stop in "*less*

than a minute". Here is CONCLUSIVE proof of negligence in failing to either *signal* at once or *stop* within a minute after plaintiff first started out the window. And finally, defendant is *estopped* by its answer to plaintiff's interrogatory where it said the only signal was given "Immediately AFTER plaintiff had fallen to the ground". The jury's verdict on the above *admitted facts* is not final or binding on this Supreme Court.

In note 15 on page 6, said Answer says plaintiff "was not cold." Defendant's own witness and "friend" who helped get plaintiff off the train at Truckee described plaintiff's condition: "He was *shaking* from the pain or cold. It was a *cold* night, it was VERY COLD. I took my sweater off and put it around his shoulders." Plaintiff was covered with just ONE sheet on this freezing night. Defendant does *not* deny that plaintiff got no first aid and the blood was permitted to freely flow from his severed ankles for ONE *hour* after the accident. Such inhuman treatment constitutes negligence *as a matter of law.*

In view of the above *admissions* of defendants *own* agents, it is submitted that plaintiff's motion for directed verdict on all three issues of negligence should have been granted.

Conclusion

The irregularities in the jury selection, especially in totally excluding plaintiff's class as a machinist from all panels require a review and correction by this Supreme Court. Defendant corporation does not even deny that all the attorneys and citizens of San Francisco have condemned said irregularities and desire a correction to remove the bad odor from the Federal Court. "It shocks the judicial instinct to allow a judgment to stand" where there is even a slight doubt about the jury's impartiality.

This Supreme Court refused plaintiff a hearing when he endeavored to proceed in the State Court because he feared said jury irregularities. It is respectfully submitted that now he should receive a hearing by this Court of *last resort* not only because he has suffered a miscarriage of justice but because all the citizens of San Francisco are likewise concerned about said jury system and want to see justice done.

Respectfully submitted,

ALLEN SPIVOCK,
Counsel for Petitioner.

Dated, San Francisco, California, September 17, 1945.